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No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

ARMAND BERARD,
PETITIONER,

v.

GENERAL MOTORS CORPORATION;
UNITED AUTOMOBILE, AEROSPACE, AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA; UNITED AUTO WORKERS
LOCAL 422 AND
BAHEEGE AYIK,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

1. Whether an individual union member has standing to bring a suit under 29 U.S.C. § 185, to enforce the provisions of a collective bargaining agreement entered into between his employer and his union.

2. Whether the refusal to issue a complaint in an unfair labor practice proceeding before the National Labor Relations Board will bar a person from subsequently bringing an action under 29 U.S.C. § 185, alleging the same or similar facts as in the unfair labor practice proceeding.

3. Does a refusal to issue a complaint in an unfair labor practice proceeding before the National Labor Relations Board bar a subsequent suit under 29 U.S.C. § 185?

4. Whether the complaint set forth sufficient facts to state a cause of action for which relief could be granted.

5. Whether summary judgment was appropriate where genuine issues of material fact were raised by depositions and answers to interrogatories.

6. Whether an individual union member must allege personal injury in his complaint in order to enforce the terms of a collective bargaining agreement into between his employer and his union.

7. Whether the District Court has subject matter jurisdiction over claims by individual union members of conspiracy to violate their rights under a collective bargaining agreement and the Labor Management Reporting and Disclosure Act of 1959 against their employer and union.

8. What statute of limitations applies to actions under the Labor Management Reporting and Disclosure Act of 1959?

9. What statute of limitations applies to a civil rights action based upon the First Amendment?

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RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Armand Berard, Petitioner, respectfully petitions for a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the First Circuit, entered on December 22, 1980, in which the Court affirmed a District Court decision and further awarded double costs to the appellees on the ground that the appeal taken was patently frivolous.

The Petitioner, Armand Berard ("Berard"), brought suit under 29 U.S.C. § 185 against his employer, General Motors Corporation ("General Motors"), against his union, Local

422 of the United Automobile, Aerospace and Agricultural Implement Workers of America ("Local 422"), the United Automobile, Aerospace and Agricultural Implement Workers of America (the "International Union") and the Local Union Representative, Baheege Ayik ("Ayik"), for breach of collective bargaining agreement and for breach of the duty of fair representation. The District Court granted summary judgment in favor of General Motors on the contract claims and dismissed all other claims against General Motors. The District Court also granted summary judgment in favor of Local 422 and Ayik on the duty of fair representation claims and the claims under the Labor Management Reporting and Disclosure Act of 1959, and dismissed all other claims against Local 422 and the International Union. The District Court relied principally on the deposition of Berard.

Opinions Below.

The decision and order of the United States District Court for the District of Massachusetts is recorded at 493 F. Supp. 1035 (Appendix B, *infra*, pp. A-3-A-19). The Opinion for the United States Court of Appeals for the First Circuit is not reported (Appendix A, *infra*, pp. A-1-A-2).

Jurisdiction.

The opinion of the Court of Appeals was filed on December 22, 1980.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutes Involved.

This case involves the interpretation and application of 29 U.S.C. § 185 and 29 U.S.C. § 412. The text of those statutes are set forth respectively in Appendix C, *infra*, and Appendix D, *infra*.

Statement of the Case.

Berard began his employment with General Motors on April 5, 1948, and continued to work in various departments at its Framingham, Massachusetts plant from that time to the present. Throughout that period, Berard was an active member of Local 422, and at various times served as its recording secretary, a member of its election board, a member of its executive board, a member of the joint council, vice-chairman of the community action program, and as editor of the local union newspaper. General Motors and the International Union, and Local 422, have been parties to a number of collective bargaining agreements covering General Motors employees, including Berard, employed in its Framingham, Massachusetts plant since December of 1948.

In 1974, Ayik obtained a five day strike authorization from Local 422's executive board and joint council. The strike authorization was to have been used as a bargaining tool by Ayik, and in no way was it to be used to actually call a strike. Contrary to the instructions of the members of the executive board, and in the face of a severe economic recession, Ayik called a strike which lasted for approximately six (6) weeks.

Shortly after the 1974 strike at the Framingham, Massachusetts plant, General Motors began to use management personnel to perform bargaining unit work much more frequently and for longer periods of time than it did prior to the 1974 strike.

Section 215 of the collective bargaining agreement entered into between General Motors and the International Union and Local 422 specifically prohibited the use of management personnel to perform bargaining unit work. A copy of that provision of the collective bargaining agreement is set forth in Appendix E, *infra*.

Berard, upon observing these violations, attempted to file the appropriate grievances with Local 422. These violations

were known as and referred to as "215 Violations." On a number of occasions, General Motors prevented Berard from bringing these 215 Violations to the attention of Local 422 representatives. Between 1974 and 1976, Berard filed a number of grievances concerning 215 Violations. Local 422 did nothing to resolve those grievances and Berard so stated that in his deposition. Although Berard continued to file 215 Violation grievances, management personnel for General Motors continued to perform bargaining unit work, and Local 422 did nothing to prevent it from happening.

General Motors and Local 422 and Ayik took retaliatory action against Berard in an attempt to discourage him from protesting management personnel performing bargaining unit work and to prevent him from filing 215 Violation grievances. In spite of all Berard's efforts, supervisory employees of General Motors are continuing to this day to perform bargaining unit work, and as a result, members of Local 422 are being laid off for lack of work, work which is being performed with more frequency and for longer periods of time by supervisory employees who are not members of Local 422.

Berard has alleged in his complaint the following facts:

1. Management personnel are performing bargaining unit work in violation of the collective bargaining agreement and the International Union, Local 422, and Ayik are allowing it to happen and are doing nothing to prevent its occurrence.

2. General Motors prevented Berard from bringing these 215 Violation grievances to the attention of Local 422.

3. The 215 Violation grievances presented to Local 422 by Berard were not processed through the steps of the grievance procedure contained in the collective bargaining agreement.

4. Local 422 breached its duty of fair representation to Berard.

5. General Motors harassed Berard and discriminated against Berard in his job assignments and in other ways because of his union activities and because he attempted to file 215 Violation grievances with Local 422.

6. General Motors, Local 422, the International Union, and Ayik conspired against Berard to prevent him from exercising his rights under the collective bargaining agreement.

7. Berard was the only employee prevented from drinking coffee on his job. It was a usual and customary practice which had existed for a long period of time, for employees to drink coffee while on their jobs.

8. Berard was prevented from talking to his co-workers while on his job. This was a usual and customary practice of long-standing duration, and Berard was the only one who was denied this right.

9. Berard was given a nonexistent job in the tire balcony isolated from other workers, and in violation of the terms of the collective bargaining agreement.

10. General Motors assigned Berard to an improper job classification, and as a result Berard lost a considerable amount of overtime pay.

11. Local 422, the International Union, and Ayik have refused to enforce the terms of the collective bargaining agreement concerning General Motors' use of management personnel performing bargaining unit work, in violation of Section 215, thereby causing union members to be laid off.

These allegations of fact are supported by stenographic transcripts and answers to interrogatories filed with the District Court.

On August 6, 1979, Berard filed a suit against General Motors, the International Union, Local 422, and Ayik for breach of collective bargaining agreement, breach of the duty of fair representation, conspiracy to violate his constitutional rights, and for violation of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412.

On September 21, 1979, General Motors filed its answer; on October 29, 1979, Ayik filed his answer; on February 11, 1980, the International Union filed its answer.

On May 16, 1980, Local 422 filed a motion for partial summary judgment, asserting the following grounds:

> 1. The allegations contained in paragraphs nine through fifteen and sixteen (a)(b)(e)(g)(h) of the complaint concerning events which occurred prior to August 7, 1978, are barred by the applicable statute of limitations;
>
> 2. There are no material issues of fact to be tried as to the allegations in these paragraphs of the complaint.

On June 9, 1980, Berard filed an opposition to that motion for partial summary judgment, stating the following reasons:

> 1. Jurisdiction is not defeated under 29 U.S.C. § 185, merely because the alleged contract violation is also arguably an unfair labor practice;
>
> 2. The court does have jurisdiction of a conspiracy claim when it alleged a violation of a federal statute;
>
> 3. The complaint does state a claim upon which relief can be granted, and there are material issues of fact and dispute. The complaint alleges that management was performing bargaining unit work in violation of the collective bargaining agreement, and that Local 422 was allowing it to occur.

On June 6, 1980, the case was called for assignment of trial, and on that date General Motors filed a motion to amend its answer and also filed a motion for summary judgment. On June 19, 1980, Local 422 and the International Union filed an amended motion for summary judgment.

On July 24, 1980, the District Court granted summary judgment on some of the claims and dismissal on the remaining claims.

The District Court found that "While I do not decide whether the Board's findings should be accorded conclusive weight in ruling on a summary judgment motion, I chose to give the Board's findings considerable weight in determining whether defendants have established the absence of any genuine fact issues on claims over which this Court has concurrent jurisdiction." Appendix B, p. A-10. The District Court further found that "[p]laintiff also stated that the union processed the grievances through the grievance procedure, but that the underlying problem was never resolved to his satisfaction." Appendix B, p. A-12. This is a factual finding which is specifically contradicted by depositions and by answers to interrogatories which Berard filed.

The District Court further found that "all of these disciplinary layoffs were processed through the grievance procedure and settled." Appendix B, p. A-12. The grievances which were settled were the retaliatory actions taken as a result of filing 215 Violation grievances. With respect to the 215 Violation grievances, these were not processed through the grievance procedure nor were they ever settled or resolved in any way.

The District Court further stated that "It is well settled that in order for an individual employee to prevail in an action brought under § 301, 29 U.S.C. § 185, against his employer for breach of contract, he must first demonstrate that the union breached its duty of fair representation in processing or failing to process his contractual grievance." Appendix B, p. A-12.

The District Court further found:

> "In view of the Board's finding that the union did not breach its duty of fair representation toward plaintiff and in view of the plaintiff's own testimony at deposition that the union did process his grievances, that he received back pay on all but one of the grievances regard-

> ing his disciplinary layoffs, and that he was merely unsatisfied with regard to the union's resolution of the grievances regarding GMC's use of management personnel, I rule that defendant GMC has demonstrated the absence of any genuine fact issue as to the union's breach of its fair representation duty. Since plaintiff has failed to respond with affidavits or otherwise, I rule that the plaintiff has failed to raise a genuine issue on the fair representation issue and that GMC is therefore entitled to summary judgment on plaintiff's contract claims." Appendix B, p. A-13.

The District Court once again made factual determinations. Berard's principal complaint was that General Motors was using supervisory personnel to perform bargaining unit work in violation of the collective bargaining agreement (215 Violations) and that Local 422 failed and refused to process those 215 Violation grievances and failed to take steps to prevent General Motors from allowing supervisory personnel to perform bargaining unit work in violation of the collective bargaining agreement, to the detriment of the members of the bargaining unit.

The District Court further concluded that "Plaintiff does not allege in his complaint that he himself has suffered any injury as the result of the alleged use of management personnel, and he admitted in his deposition that he has in fact suffered no injury. On this basis alone, plaintiff lacks the requisite standing to enforce that particular contract provisions in a § 301 action." Appendix B, pp. A-13-A-14.

The assertion made by the District Court that Berard admitted he suffered no injury is a totally inaccurate reading of the deposition. Berard stated in his deposition that he lost a considerable amount of overtime because he was improperly placed in a unit by General Motors.

The District Court also stated that "[f]or the reasons stated in *Abrams,* this Court lacks jurisdiction over the conspiracy claim, and it must be dismissed." Appendix B, p. A-15.

The District Court also ruled "that the three-year Massachusetts tort statute of limitations is the most appropriate, and therefore will govern, plaintiff's free speech claims under the LMRDA. Since plaintiff filed this action on August 7, 1979, all allegations concerning activity taking place more than three years earlier are time-barred." Appendix B, p. A-17.

The District Court further concluded that "[p]laintiff's opposition to the union defendant's summary judgment motion is not supported by affidavits, or other documentation, setting forth specific facts showing that genuine issues exist for trial." Appendix B, p. A-18. In fact, Berard stated under oath in deposition and in answers to interrogatories facts which were directly contradictory to those facts alleged by Local 422 and General Motors. General Motors did not submit an affidavit in support of its motion for summary judgment but relied upon the deposition of Berard and took many of the statements made by Berard out of context. The District Court considered only that part of Berard's deposition and did not consider substantial portions of Berard's deposition which clearly set forth genuine issues of material fact.

A complete reading of the deposition, answers to interrogatories and admissions of fact filed in this case clearly disclose a number of material issues of fact raised by Berard:

1. Management personnel are performing bargaining unit work in violation of the collective bargaining agreement, and Local 422, the International Union, and Ayik are allowing to happen and are doing nothing to prevent it from happening;

2. General Motors prevented Berard from bringing a number of grievances to the attention of Local 422;

3. The grievances presented by Berard were not processed through the steps of the grievance procedure contained in the collective bargaining agreement;

4. General Motors harassed Berard and discriminated against him in his job assignments and otherwise because of his union activities and because he filed 215 Violation grievances;

5. General Motors, Local 422, the International Union and Ayik conspired against Berard to prevent him from exercising his rights under the collective bargaining agreement;

6. This conspiracy against Berard is ongoing, and continues to exist to the present time;

7. A nonexistent job was given to Berard in order to isolate him from his co-workers, in complete and total violation of the collective bargaining agreement;

8. Berard lost a considerable amount of overtime pay because General Motors placed him in an improper job classification;

9. Local 422, the International Union, and Ayik have refused to enforce the terms of the collective bargaining agreement concerning General Motors' use of management personnel to perform bargaining unit work, thereby causing members of the bargaining unit to be laid off.

The Court of Appeals affirmed the decision of the District Court and awarded double costs "[b]ecause the appeal is patently frivolous." Appendix A, p. A-2.

Reasons for Granting Writ.

I. THE DECISION BELOW PRESENTS A DIRECT CONFLICT WITH THE DECISION OF THIS COURT AND OTHER COURTS AND WITH THE LEGISLATIVE HISTORY AND PURPOSE OF § 301 OF THE TAFT-HARTLEY ACT.

The question presented by this petition is a critical one, and should be decided by this Court. There is a clear-cut split of authority in the Circuit Courts over the meaning of "Concerted Activity," and whether an individual union member can enforce the terms of a collective bargaining agreement on behalf of the members of that bargaining unit where the union refuses to do so.

The National Labor Relations Board, *ARO, Inc.*, 227 N.L.R.B. 243 (1976), the second circuit, *NLRB v. Interboro Contractors, Inc.*, 388 F. 2d 495 (2d Cir. 1967), and the ninth circuit, *NLRB v. C & I Air Conditioning, Inc.*, 486 F. 2d 977 (9th Cir. 1973), have held that a complaint by an individual employee in an effort to enforce the provisions of a collective bargaining agreement constitutes "concerted activity," even in the absence of interest by other union members in a complaint. The third, fifth and sixth circuits have held that in order for an individual's actions to be "concerted activity" it must be shown that the individual was in fact acting on behalf of other employees. See *NLRB v. Northern Metal Company*, 440 F. 2d 881 (3d Cir. 1971); *NLRB v. Buddies Supermarkets, Inc.*, 481 F. 2d 714 (5th Cir. 1973); *ARO, Inc. v. NLRB*, 596 F. 2d 713, 718 (6th Cir. 1979).

Berard was attempting to enforce Section 215 of the collective bargaining agreement for the benefit of all of the union members. This is clearly "concerted activity." Before seeking judicial relief, Berard attempted to persuade Local 422

and the International Union and Ayik to take steps to prevent supervisory personnel from performing bargaining unit work in violation of Section 215 of the collective bargaining agreement. All of Berard's efforts were futile, and his complaints against Local 422, the International Union and Ayik that they were not acting in the best interests of their union members fell on deaf ears.

In *NLRB v. Bighorn Beverage,* 614 F. 2d 1238 (9th Cir. 1980), the court stated that " 'activity engaged in by an individual employee acting alone which was directed to enforce or implement the terms of a collective bargaining agreement will be deemed concerted activity within the meaning of § 7.' " *Id.* at 1242.

In *ARO, Inc. v. NLRB,* 596 F. 2d 713 (6th Cir. 1979), the court stated that "[f]or an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement." *Id.* at 718.

In *NLRB v. Dawson Cabinet Co., Inc.,* 566 F. 2d 1079 (8th Cir. 1977), the court held that "in order for employee activity to be protected under the Act, the activity must not only have a lawful objective and be carried out by lawful and proper means, but it must also be 'concerted.' " *Id.* at 1082 (this case dos not appear to overrule the decision in the *Interboro* case, *supra,* see concurring opinion of C.J. Lay, *id.* at 1084-1085.

In *NLRB v. Northern Metal Company,* 440 F. 2d 881 (3d Cir. 1971), an individual attempted to seek holiday pay under the terms of the collective bargaining agreement. That court declined to follow the reasoning in the *Interboro* case, *supra,* but in that case a strong dissent was filed by C.J. Biggs. *Id.* at 887-889.

In *NLRB v. Transcon Lines*, 599 F. 2d 719 (5th Cir. 1979), a dissident union member criticized the union leadership, and the union caused the employer to interfere with that person's rights under § 7 (29 U.S.C. § 157). The court held that "[a]ttempts by employees to bring about changes in their union's performance as their collective bargaining representative are 'certainly "concerted activity" protected by Section 8(a)(1) of the Act.' " *Id.* at 721.

There is nothing which requires an individual union member to seek remedies for violation of his rights under 29 U.S.C. § 157 with the National Labor Relations Board. 29 U.S.C. § 185 provides an alternative remedy for an individual employee who is aggrieved by violations of collective bargaining agreements and for violations of the duty of fair representation.

Some courts have held that an individual has no standing to sue under 29 U.S.C. § 185 to enforce a right for the benefit of the bargaining unit as a whole. See *Brown v. Sterling Aluminum Products Corp.*, 365 F. 2d 651, 657 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967), *rehearing denied*, 386 U.S. 1027 (1967); *Lerwill v. Inflight Services, Inc.*, 379 F. Supp. 690, 693 (N.D. Cal. 1974); *Black-Clawson Co., Inc., Paper Machine Division v. International Association of Machinists*, 313 F. 2d 179, 183 (2d Cir. 1962). Other courts have held that an individual does have standing to sue under 29 U.S.C. § 185 to enforce rights on behalf of the union membership. See *Jensen v. Farrell Lines, Inc.*, 477 F. Supp. 335, 347-348 (S.D.N.Y. 1979); *Kaferle v. Fredrick*, 360 F. 2d 536 (3d Cir. 1966); *Talbot v. National Super Markets of Louisiana*, 372 F. Supp. 1050, 1052-1053 (E.D. La. 1974); *Smith v. Evening News Association*, 371 U.S. 195, 200 (1962). *Vaca v. Sipes*, 386 U.S. 171, 176-177 (1967).

A union's breach of its duty of fair representation in handling an employee's grievance, so as to excuse the employee's

exhaustion of the grievance procedure before suing the employer under 29 U.S.C. § 185 for breach of the collective bargaining agreement has been shown by proof that the union is hostile to the employee and will not give him adequate representation and that the union colluded with the employer to deprive the employee of his rights. See *Hiller v. Liquor Salesmen's Union Local No. 2,* 338 F. 2d 778 (2d Cir. 1964); *Smith v. Pittsburgh Gage and Supply Company,* 464 F. 2d 870 (3d Cir. 1972).

II. The Decision below Presents a Direct Conflict with the Decision of This Court and Other Courts Concerning the Grant of Summary Judgment.

General Motors moved for summary judgment on the ground that Berard's breach of collective bargaining agreement and conspiracy claims presented no genuine issues of material fact. In considering that motion, the District was required to grant summary judgment only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, shown that there is no genuine issue as to any material fact. . . ." Fed. R. Civ. P. 56(c). General Motors, the moving party, had "the burden of showing the absence of a genuine issue as to any material fact. . . ." *Adickes v. Kress & Co.,* 398 U.S. 144, 157 (1970). The court was required to look at the entire record and the materials presented by General Motors "in the light most favorable to . . . the party opposing the motion." *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473 (1962).

General Motors attempted to meet its burden by replying on statements taken out of context from Berard's deposition and by relying upon a decision by the National Labor Relations Board not to issue a complaint with respect to certain

unfair labor practice charges brought by Berard. Berard filed grievances concerning management personnel performing bargaining unit work, the so-called 215 Violation grievances, and they were either ignored by Local 422 or were pursued in a perfunctory manner.

There are two sets of grievances in this case. The first set of grievances concerns management personnel performing bargaining unit work, the 215 Violation grievances. The second set of grievances involves the harassment and discriminatory treatment of Berard by Local 422 and General Motors because of Berard's attempts to persuade his union and his fellow workers to protest management personnel performing bargaining work, the 215 Violation grievances. The union leadership refused to do anything about preventing management personnel from performing bargaining unit work. For the most part, the second set of grievances was resolved favorably to Berard. However, the grievances which Berard has complained of, the 215 Violation grievances, Local 422 has never resolved. (This contention is supported by stenographic transcripts taken of Berard beginning on Page 111, particularly on Pages 128-139.)

Before the District Court can give any weight to the decision of the National Labor Relations Board not to issue a complaint, the District Court must find that the issues in the National Labor Relations Board proceeding are the same issues involved in the suit under 29 U.S.C. § 185. The District Court failed to make this finding. The National Labor Relations Board never addressed the issues concerning the 215 Violation grievances.

Trial by affidavit is a most unsatisfactory method of resolving disputes. The summary judgment device has been overused to the point where it is difficult to obtain a trial on the merits. General Motors must clearly show to the satisfaction of the District Court that there is an absence of any genuine

issue as to any material fact and that the opposing party has failed to show by affidavits or otherwise specific facts that there is a genuine issue for trial before summary judgment can be granted.

There are genuine issues of material fact in dispute. Did General Motors breach the collective bargaining agreement by using management personnel to perform bargaining unit work? Did General Motors conspire with Local 422, the International Union, and Ayik to ignore Bernard's grievances concerning management personnel performing bargaining unit work? General Motors, in its answers to interrogatories, denied that management personnel performed bargaining unit work (answer to interrogatory number 10). Local 422 in its answers to interrogatories acknowledged that management personnel did perform bargaining agreement work on occasion (answer to interrogatory number 21). Not only did Berard claim in his answers to interrogatories and in his deposition that management personnel were performing bargaining unit work, but there were a number of other employees who stated in depositions that management personnel were performing bargaining unit work and were continuing to perform bargaining unit work, in violation of the collective bargaining agreement, and Local 422 was doing nothing to prevent it.

The function of a motion for summary judgment is not to determine factual issues, but is designed to determine whether material issues of fact exist. According to Berard, management personnel are continuing to perform bargaining unit work in violation of the collective bargaining agreement, and Local 422, the International Union, and Ayik have refused to do anything about it, and that these particular grievances, i.e., management personnel performing bargaining unit work, are being handled in an arbitrary and perfunctory fashion and in violation of Local 422's duty of fair representation.

Jurisdiction is not defeated under 29 U.S.C. § 185 merely because the alleged contract violation is also arguably an unfair labor practice. See *Teamsters Local 174 v. Lucas Flour Company,* 369 U.S. 95 (1962); *Smith v. Evening News Association,* 371 U.S. 195 (1962); *Humphrey v. Moore,* 375 U.S. 335 (1964); *Vaca v. Sipes,* 386 U.S. 171 (1967); *NLRB v. Great Dane Trailer Inc.,* 388 U.S. 26 (1967); *General Warehousemen and Helpers v. Standard Brands, Inc.,* 579 F. 2d 1282 (5th Cir. 1978); *Bell v. IML Freight, Inc.,* 589 F. 2d 502 (10th Cir. 1979). The refusal to issue a complaint in an unfair labor practice proceeding before the National Labor Relations Board should not bar a subsequent suit under 29 U.S.C. § 185. See *Thomas v. Consolidation Coal Company,* 380 F. 2d 69 (4th Cir. 1967), *cert. denied,* 389 U.S. 1004; *Peltzman v. Central Gulf Lines, Inc.,* 497 F. 2d 332 (2d Cir. 1974).

There are material issues of fact in dispute. Therefore, the motion for summary judgment should not have been granted. See *United Steelworkers of America v. American Manufacturing Company,* 363 U.S. 564 (1960); *Local 81, American Federation of Technical Engineers v. Western Electric Company, Inc.,* 508 F. 2d 106 (7th Cir. 1974).

In a very similar case to the present one, the case of *Hughes v. International Brotherhood of Teamsters, Local 683,* 554 F. 2d 365 (9th Cir. 1977), an employee alleged that his company violated the collective bargaining agreement and because of his outspoken criticism of such violation, he was subjected to harassment. The District Court granted summary judgment in favor of the defendants. The Court of Appeals reversed and remanded for further proceedings. The court cited a number of affidavits and different employees who were fired for standing firm on the issue of the contract violations and were told by the union " 'not to rock the boat.' " *Id.* at 368. The court further described the situation as a one where the plaintiff was caught between a hostile employer and a union

which appeared to represent the employer's interests rather than those of the employees. The court said, "[i]f summary judgment would be proper in the present case, all a union would have to do to protect itself against a fair representation suit would be to go through the motions of processing an employee's grievance short of arbitration sufficient to withstand a claim that these motions were merely perfunctory." *Id.* at 368.

III. The Case Raises Vital Questions concerning § 301, the Duty of Fair Representations, What Constitutes "Concerted Activity," What Standing an Individual Has to Enforce the Terms of a Collective Bargaining Agreement on Behalf of Other Union Members Not Party to the Suit, Which Have Not Been, But Should Be Decided by This Court.

There are conflicting theories among the Circuit Courts as to what constitutes "concerted activity" and whether an individual union member can enforce a provision of a collective bargaining agreement on behalf of the membership where the union leadership refuses to act to enforce that provision.

There have been a number of cases seeking to define the parameters of "concerted activity." There are at least two different views with variations among the circuits as to what constitutes "concerted activity." There should be a uniform federal labor policy concerning this issue or the courts will continue to face a proliferation of law suits attempting to define that term.

This Court should determine and define what is meant by "concerted activity."

This Court should also provide a remedy for individual union members seeking to enforce the terms of their collective bargaining agreement when the union fails or refuses to fulfill its obligations.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

Appendix A.

NOT FOR PUBLICATION

United States Court of Appeals
For the First Circuit

No. 80-1563

ARMAND BERARD,
PLAINTIFF-APPELLANT,

v.

GENERAL MOTORS CORPORATION;
UNITED AUTOMOBILE, AEROSPACE, and
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA; UNITED AUTO WORKERS
LOCAL 422 and
BAHEEGE AYIK,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

493 F. Supp. 1035

Before
COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Frederick T. Golder, for appellant.

William F. Joy, Jr., with whom *William F. Joy*, and *Morgan, Brown, Kearns & Joy* were on brief, for appellee General Motors Corporation.

Bertram A. Diamond, with whom *John A. Fillion*, Generai Counsel, *Leonard R. Page, Jordan Rossen, M. Jay Whitman*, Associate General Counsel, were on brief, for appellees International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local 422 and Baheege AYIK.

December 22, 1980

Per Curiam. We affirm on the basis of the opinion below. Because the appeal is patently frivolous, double costs are awarded to the appellees. Fed.R.App.P. 38.

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARMAND BERARD,
Plaintiff,

v.

GENERAL MOTORS CORPORATION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UNITED AUTO WORKERS, LOCAL 422 and BAHEEGE AYIK,
Defendants.

CIVIL ACTION
No. 79-1556-C

ORDER

July 24, 1980

CAFFREY, Ch. J.

In accordance with the memorandum filed this date, it is ORDERED:

1. The motion of defendant GMC for summary judgment is allowed on plaintiff's contract claims; all other claims against GMC are dismissed;

2. The motion of defendants Local 422 and Ayik for summary judgment on plaintiff's fair representation and LMRDA claims is allowed; all other claims against the union defendants are dismissed.

Andrew A. Caffrey, Ch. J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARMAND BERARD,
Plaintiff,

v.

GENERAL MOTORS CORPORATION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UNITED AUTO WORKERS, LOCAL 422 AND BAHEEGE AYIK,
Defendants.

CIVIL ACTION
No. 79-1556-C

MEMORANDUM

July 24, 1980

CAFFREY, Ch. J.

This is a civil action brought by plaintiff Armand Berard against General Motors Corporation (GMC), his employer, Local 422 of the United Automobile, Aerospace, and Agricultural Employment Workers of America (Local 422), his union, and Baheege Ayik, an officer of Local 422.[1] The jurisdiction of this Court is invoked pursuant to 29 U.S.C. § 185 and 29 U.S.C. § 412.

This case is presently before the Court on two motions. Both union defendants have moved for summary judgment

[1] The complaint also named the International as a defendant in his complaint. At the hearing on these motions, the action was dismissed against the International, on its motion, because of the plaintiff's admission that he had never served the International.

on the grounds that most of the plaintiff's claims against them are barred by the applicable statute of limitations, and that, as to the remaining claims, there are no genuine issues of fact and defendants are entitled to judgment as a matter of law. GMC has moved for summary judgment on one of plaintiff's claims and has moved to dismiss the remainder of his claims on the ground that this Court lacks subject matter jurisdiction.

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the

> "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. . . ."

The moving party has "the burden of showing the absence of a genuine issue as to any material fact. . . ." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Mack* v. *Cape Elizabeth School Board*, 553 F. 2d 720, 722 (1st Cir. 1977). In determining whether to grant summary judgment, the court must consider the record "in the light most favorable to . . . the party opposing the motion," *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962); *Hahn* v. *Sargent*, 523 F. 2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976), and "indulge all inferences favorable to the party opposing the motion." *Hahn* v. *Sargent*, *supra*, at 464. When the summary judgment motion has been properly supported, however, the opposing party

> "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289 (1968); *Perez* v. *United States*, 594 F. 2d 280, 290 (1st Cir. 1979).

A promise by the opposing party that evidence will be forthcoming at trial is not sufficient. *Hahn* v. *Sargent, supra,* at 467. While a "plaintiff is entitled to all favorable inferences, he is not entitled to build a case on the gossamer threads of whimsey, speculation and conjecture." *Manganaro* v. *Delaval Separator Co.,* 309 F. 2d 389, 393 (1st Cir. 1962).

In his complaint, plaintiff states that he began his employment with GMC on April 5, 1948, and has continued to work in various departments of its Framingham plant to the present time. The gravamen of plaintiff's complaint is the company's use of management personnel to perform bargaining unit work in violation of the collective bargaining agreement. Plaintiff alleges that shortly after a strike at the Framingham GMC plant in 1974, the company began using management personnel in violation of the contract. Upon observing these violations, plaintiff filed a number of grievances with representatives of Local 422, and "became the principal spokesman for all Union members protesting these violations." The allegations which plaintiff makes in the remainder of his complaint may be summarized as follows:

1. That defendant Local 422, through defendant Ayik, refused to pursue the grievances as to the use of management personnel and thereby breached its duty of fair representation.

2. That defendant GMC and defendant Local 422, through defendant Ayik, conspired to discriminate against plaintiff for his union activity and for filing grievances with regard to the use of management personnel, in violation of the Local's duty of fair representation, the collective bargaining agreement, and plaintiff's rights under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§ 411(a)(2) and (a)(5). In support of his conspiracy claim, plaintiff makes the following allegations of wrongful conduct by the defendants:

a. That plaintiff was subjected to physical and mental harassment in the form of telephone threats and vandalism to his automobile;
b. That he was denied coffee breaks;
c. That he was denied the right to converse with other co-workers and Union members;
d. That, on or about July 21, 1976, the plaintiff was transferred to an isolated tire balcony and given a non-existent job;
e. That plaintiff was forced to spend several complete work days in a secluded room;
f. That he was forced to defend a $300,000 law suit brought by the defendant Ayik against him;
g. That he was suspended for two (2) weeks by the defendant company for refusing to stop protesting management performing bargaining unit work in violation of the collective bargaining agreement;
h. That defendant Local Union and the defendant Ayik refused to process grievances filed by him.

3. That on or about October 22, 1975 plaintiff was laid off notwithstanding his seniority and in spite of the fact that the plant was in full production. Plaintiff alleges that this layoff was also a result of his union activity and to interfere with his rights under the collective bargaining agreement and the LMRDA.

4. That as a result of his protests, plaintiff was ousted as editor of the union newspaper by defendant Ayik and others acting on behalf of Local 422, and that he was prevented from contributing articles to the newspaper, in violation of his rights under the LMRDA, 29 U.S.C. § 411(a)(2).

5. That defendants Local 422 and Ayik failed to adequately grieve the plaintiff's disciplinary layoffs, in violation of the duty of fair representation.

On the basis of these allegations, plaintiff seeks the following relief:

1. A determination that the defendant GMC discriminated against plaintiff without just cause and in violation of his rights under the collective bargaining agreement.

2. A determination that the Local 422 breached its duty of fair representation by refusing to process his grievances.

3. A declaration that the proceedings taken by Local 422 and Ayik violated his rights under the LMRDA.

4. An injunction preventing GMC and the union defendants from interfering with his rights under the LMRDA, the First and Fourteenth Amendments, and 29 U.S.C. § 151 et seq. to express his views concerning the defendant GMC and defendant Local 422.

5. Damages.

Based on the foregoing, this Court will treat plaintiff's complaint as raising the following legal claims:

1. That Local 422 breached its duty of fair representation in processing or refusing to process plaintiff's grievances regarding the use of management personnel and regarding plaintiff's disciplinary layoffs.

2. That both GMC and the union defendants violated his rights under LMRDA § 411(a)(2) and the First and Fourteenth Amendments.

3. That both GMC and the union defendants discriminated against plaintiff because of his union activity.

4. That GMC breached the collective bargaining contract, both in regard to its use of management personnel to perform bargaining unit work, and in regard to plaintiff's disciplinary layoffs.

5. That all defendants engaged in a conspiracy to commit the above substantive violations.

On December 14, 1977, plaintiff filed unfair labor practice charges with the National Labor Relations Board against both GMC and Local 422. Plaintiff charged that GMC "has discriminated against me due to my union and other pro-

tected, concerted activities," in violation of §§ 8(a)(1) and (a)(3) of the National Labor Relations Act; 29 U.S.C. §§ 158(a)(1) and (a)(3). Plaintiff charged that Local 422 "has restrained or coerced me in the exercise of my Section 7 rights" and "has caused my Employer to discriminate against me," in violation of §§ 8(b)(1)(A) and (b)(2), 29 U.S.C. §§ 158(b)(1)(A) and (b)(2). On January 15, 1978, the Regional Director of the NLRB notified plaintiff by letter that he was refusing to issue a complaint:

> I have determined that further proceedings on the charges are not warranted.
>
> With regard to the charge against the Employer in Case No. 1-CA-13,951, the investigation did not reveal evidence sufficient to establish that the Employer discriminated against you because of your union activities, or other protected activities when it made the work assignments or took the disciplinary action which you alleged during the investigation. Rather, it appears from the investigation that the Employer took those actions because of its legitimate production needs and because it was not satisfied with your work performance.
>
> With regard to the charge against the Union in Case No. 1-CB-3962, it does not appear from the investigation that the Union has failed in its duty to fairly represent you or that it has otherwise restrained or coerced you in the exercise of the rights guaranteed to you by the Act. The investigation revealed that the Union accepted numerous grievances from you and processed them on your behalf, and the evidence disclosed by the investigation is not sufficient to establish that the Union has refused to process grievances for you or has otherwise failed in its duty to represent you. Nor did the investigation reveal evidence sufficient to establish that the Union has caused or attempted to cause the Employer to discriminate

> against you because of any activity in which you engaged which is protected by the Act.
>
> I am, therefore, refusing to issue a complaint in these matters.

Plaintiff appealed the Regional Director's refusal to issue a complaint to the General Counsel; on March 30, 1978, the General Counsel denied the appeal for the reasons set forth in the Regional Director's letter.

As a preliminary matter, I will deal with the contention of both GMC and the union defendants that plaintiff is bound by the adverse decision of the NLRB and cannot attack it collaterally. Although the Court of Appeals for this Circuit has not yet reached the question whether an NLRB refusal to issue an unfair labor practice complaint is res judicata, see *Soto Segarra* v. *Sea-Land Service, Inc.*, 581 F. 2d 291, 294 (1st Cir. 1978), the unanimous weight of authority is that the Board's refusal to issue a complaint has no res judicata effect in a subsequent § 301 action. *E.g., Smith* v. *Local 25, Sheet Metal Workers,* 500 F. 2d 741, 748 n.4 (5th Cir. 1974); *Thomas* v. *Consolidated Coal Co.,* 380 F. 2d 69, 78 & n.12 (4th Cir.), *cert. denied,* 389 U.S. 1004 (1967); *Ruzicka* v. *General Motors Corp.,* 336 F. Supp. 824, 827 (E.D. Mich. 1972). Nevertheless, as the Fifth Circuit held in *Smith, supra,* "[t]his does not mean . . . that express findings in a refusal to issue a complaint are to be ignored." 500 F. 2d at 748 n.4. The *Smith* court stated that the union is entitled to use the Board's findings "in its summary judgment motion, and the [plaintiff is] then obligated to demonstrate by affidavit that a genuine issue of material fact exist[s] in spite of the Board finding." *Id.* While I do not decide whether the Board's findings should be accorded conclusive weight in ruling on a summary judgment motion, I choose to give the Board's findings considerable weight in determining whether defendants have established the absence of any genuine fact issues on claims over which this Court has concurrent jurisdiction.

I. Claims Against Defendant GMC

A. *Contract Claims Against GMC*

Defendant GMC has moved for summary judgment on plaintiff's breach of contract claims. Plaintiff alleges that GMC breached the collective bargaining agreement both in regard to its use of management personnel to perform bargaining unit work, and in regard to plaintiff's disciplinary layoffs.[2] In support of its motion, the defendant GMC relies principally on the deposition testimony of the plaintiff. Plaintiff testified that in the period of time between November 1974, when the strike ended, to the end of 1976 he filed *over*

---

[2] In addition, plaintiff alleges that GMC discriminated against plaintiff because of his union activity. While it is not entirely clear, he appears to contend that this also constituted a breach of the collective bargaining agreement. Even if GMC's alleged discriminatory conduct did constitute a breach of contract, this Court need not consider plaintiff's claim based thereon because plaintiff does not allege that he attempted to grieve this conduct. It is hornbook law that in order to file a § 301 action for breach of contract, the employee must first attempt to utilize his contractual remedies. *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, 652-53 (1965). Failing to do so, plaintiff cannot raise this claimed breach for the first time here.

Of course, if GMC's alleged discriminatory conduct did *not* constitute a breach of the collective bargaining contract, then jurisdiction to adjudicate claims based thereon would rest exclusively with the National Labor Relations Board as violations of §§ 8(a)(1) and (a)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (a)(3). As noted above, plaintiff filed unfair labor practice charges with the Board based on these sections of the Act; the Board declined to issue a complaint on the ground that the charges were not warranted.

In any event, the discussion which follows regarding the plaintiff's failure to raise a genuine fact issue on the union's breach of its fair representation duty is equally pertinent to his claims based on the company's discriminatory conduct.

400 grievances with the union contesting the use of management personnel, specifically foremen, to do bargaining unit work. Plaintiff also stated that the union processed the grievances through the grievance procedure, but that the underlying problem was never resolved to his satisfaction.

From 1974 to the commencement of this action, defendant GMC's records indicate that plaintiff was given disciplinary layoffs on thirteen occasions for violations of shop rules. Plaintiff agreed at his deposition that all of these disciplinary layoffs were processed through the grievance procedure and settled. As a result, plaintiff received back pay with respect to twelve of the disciplinary layoffs and his record was cleared of discipline. The one grievance for which he did not receive back pay was compromised in settlement.

Plaintiff's opposition to GMC's motion for summary judgment contains a general statement that there "are material issues of fact in dispute," accompanied by a list of such fact issues which appears to be nothing more than a rehash of the complaint. He has not, however, supported his opposition with affidavits, or as otherwise allowed by the Federal Rules of Civil Procedure. He has, therefore, failed to set forth specific facts showing that there are genuine issues for trial. If defendant GMC has successfully carried its burden of demonstrating the absence of any genuine fact issues, summary judgment is appropriate.

It is well settled that in order for an individual employee to prevail in an action brought under § 301, 29 U.S.C. § 185, against his employer for breach of contract, he must first demonstrate that the union breached its duty of fair representation in processing or failing to process his contractual grievance. *Vaca* v. *Sipes,* 386 U.S. 171, 185-86 (1967); *Soto Segarra* v. *Sea-Land Service, Inc.,* 581 F. 2d 291, 294-95 (1st Cir. 1978). "That duty of fair representation is breached if the union treats the grievance in an arbitrary, discriminatory

or bad faith manner. For example, the union 'may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion.' " *Soto Segarra, supra,* at 295 (citing *Vaca, supra,* at 191).

The plaintiff here is not relieved from his obligations under Rule 56(e) by the mere fact that he must demonstrate the union's bad faith or arbitrary conduct. Although "great circumspection is required where summary judgment is sought on an issue involving state of mind . . ., that does not mean that a party against whom summary judgment is sought is entitled to a trial simply because he has asserted a cause of action to which state of mind is a material element." *Hahn* v. *Sargent,* 523 F. 2d 461, 468 (1st Cir. 1975).

In view of the Board's finding that the union did not breach its duty of fair representation toward plaintiff and in view of the plaintiff's own testimony at deposition that the union did process his grievances, that he received back pay on all but one of the grievances regarding his disciplinary layoffs, and that he was merely unsatisfied with regard to the union's resolution of the grievances regarding GMC's use of management personnel, I rule that defendant GMC has demonstrated the absence of any genuine fact issue as to the union's breach of its fair representation duty. Since plaintiff has failed to respond with affidavits or otherwise, I rule that the plaintiff has failed to raise a genuine issue on the fair representation issue and that GMC is therefore entitled to summary judgment on plaintiff's contract claims.

There is another basis on which to grant summary judgment on plaintiff's claims regarding the company's alleged improper use of management personnel. Plaintiff does not allege in his complaint that he himself has suffered any injury as the result of the alleged use of management personnel, and he admitted in his deposition that he has in fact suffered no injury. On this basis alone, plaintiff lacks the requisite stand-

ing to enforce that particular contract provisions in a § 301 action. *See Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 498-99 (1975). *See also Brown* v. *Sterling Aluminum Products Corp.*, 365 F. 2d 651, 657 (8th Cir. 1966), *cert. denied*, 386 U.S. 957, *rehearing denied*, 386 U.S. 1027 (1967).

B. *LMRDA Claim Against GMC*

GMC has moved to dismiss plaintiff's claim against it under the LMRDA on the ground that this Court lacks subject matter jurisdiction. Plaintiff alleges that GMC violated his rights under the free speech provision of the LMRDA, 29 U.S.C. § 411(a)(2).

The Court of Appeals for this Circuit has unequivocally held that the LMRDA provides a right of actions against unions only and that, as a matter of law, no relief can be secured against an employer. *Hayes* v. *Consolidated Service Corp.*, 517 F. 2d 564, 566 (1st Cir. 1975). On this basis, the LMRDA claim against GMC must be dismissed.

C. *Conspiracy Claim Against GMC*

The defendant has also moved to dismiss plaintiff's conspiracy claim on the ground that this Court lacks subject matter jurisdiction. The plaintiff alleges that both GMC and the union defendants engaged in a conspiracy to violate plaintiff's rights under the collective bargaining agreement and under the LMRDA.

In *Abrams* v. *Carrier Corp.*, 434 F. 2d 1234 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971), the Second Circuit dismissed similar conspiracy claims brought against an employer and union defendants. The Court stated:

> "The complaint additionally alleges a plethora of conspiracy claims against all the defendants, charging them with conspiring to commit the various wrongs charged against each defendant individually. These claims must be dismissed for two reasons. First, there exists no federal statute conferring independent jurisdiction upon the federal courts for claims of civil conspiracy in the labor relations field, . . . nor does conspiracy to violate either a labor contract or an individual's rights under the LMRDA suffice to vest the courts with jurisdiction pursuant to § 301 of the LMRDA or § 102 of the LMRDA, respectively . . . . Second, we find no authority creating a common law federal tort based upon an allegation of conspiracy alone." *Id.* at 1253-54 (citations omitted).

For the reasons stated in *Abrams*, this Court lacks jurisdiction over the conspiracy claim,[3] and it must be dismissed.

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[3] Conspiracy may, in certain very limited circumstances, constitute a separate cause of action under Massachusetts tort law. *Neustadt* v. *Employer's Liability Assurance Corp.*, 303 Mass. 321, 325 (1939); *Fleming* v. *Dane*, 304 Mass. 46, 50-51 (1939). However, even assuming arguendo that those circumstances exist here, the state law of conspiracy has no role to play in this case. *See United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729-35 (1966); *Teamsters Union* v. *Morton*, 377 U.S. 252, 257-61 (1964). In any event, because I have dismissed or rendered summary judgment for defendants on all of plaintiff's federal claims, there is no basis for exercise of pendant jurisdiction over plaintiff's conspiracy claim to the extent it does state a cause of action under state law. *Gibbs, supra* 383 U.S. at 726.

II. Claims Against The Union Defendants

A. *Fair Representation and Conspiracy Claims Against Union Defendants*

For the reasons stated above in my discussion of plaintiff's claims against defendant GMC, the union defendant's are entitled to summary judgment on plaintiff's fair representation claim and an order of dismissal on plaintiff's conspiracy claim.[4]

B. *LMRDA Claim Against Union Defendants*

The union defendants have moved for summary judgment on most of the allegations contained in plaintiff's complaint on the ground that they are barred by the statute of limitations as to the remaining allegations, the union defendants contend that there are no genuine issues of fact and that they are entitled to judgment as a matter of law.

Since the LMRDA does not contain an express statute of limitations, this Court must look to the most analogous state statute of limitations. *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 704-05 (1966). The Court of Appeals for this Circuit has not yet had occasion to determine which state statute of limitations is most appropriate in an action under the LMRDA. The First Circuit has, however, held that fair representation suits are governed by the state tort statute of limitations. *DeArroyo* v. *Sindicato De Trabajadores Packinghouse*, 425 F. 2d 281, 287 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970). The Massachusetts tort statute of limitations, Mass. Gen. Laws ch. 260, § 2A, is three years. The union de-

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[4] As to plaintiff's claim that the union defendants discriminated against plaintiff, see discussion in note 2, *supra*.

fendants contend that the tort statute, rather than the longer contract statute, also governs plaintiff's claim under the LMRDA.

Plaintiff's claim under the free speech provision of the LMRDA, 29 U.S.C. § 411(a)(2), is very analogous to an action based on infringement of rights arising under the First Amendment. The First Circuit has held that a civil rights action based on the First Amendment is governed by the state tort, not contract, statute of limitations. *Graffals Gonzaley* v. *Garcia Santiago,* 550 F. 2d 687, 688 (1st Cir. 1977). And, other courts have applied the state tort statute of limitations to free speech claims under the LMRDA on the ground that they are more analogous to an action sounding in tort than one sounding in contract. *E.g., Howard* v. *Aluminum Workers International Union,* 589 F. 2d 771, 774 (4th Cir. 1978); *Sewell* v. *Grand Lodge of the International Association of Machinists,* 445 F. 2d 545, 550 (5th Cir. 1971), *cert. denied,* 404 U.S. 1024 (1972). Based on the foregoing, I rule that the three-year Massachusetts tort statute of limitations is the most appropriate, and therefore will govern, plaintiff's free speech claims under the LMRDA. Since plaintiff filed this action on August 7, 1979, all allegations concerning activity taking place more than three years earlier are time-barred.

In support of their motion for summary judgment, the union defendants rely primarily on the deposition testimony of the plaintiff. From his testimony, it appears that, of those allegations which can even remotely be viewed as pertinent to the plaintiff's LMRDA claim, the following occurred more than three years before the complaint was filed: the alleged harrassment and vandalism; plaintiff's transfer to an isolated tire balcony; plaintiff's seclusion in a room; plaintiff's two-week suspension for refusing to cease protesting the use of management personnel; and plaintiff's alleged ouster as editor of the union newspaper and his inability to contribute

articles to the newspaper. As to these allegations, the union defendants have carried their burden of establishing the absence of any genuine issues regarding the timeliness of plaintiff's LMRDA claim.

Plaintiff's opposition to the union defendant's summary judgment motion is not supported by affidavits, or other documentation, setting forth specific facts showing that genuine issues exist for trial. Plaintiff merely states that the "act of refusing the plaintiff access to the union newspaper is ongoing," and that the complaint sets forth "a series of discriminatory and wrongful acts by union and management, but there are additional wrongs for which the plaintiff seeks redress." This response is hardly adequate under Rule 56(e) and I therefore rule that the union defendants are entitled to summary judgment on the allegations set forth above, to the extent they can be viewed as stating a claim under the free speech provision of the LMRDA.

The union defendants have also moved for summary judgment on the remaining allegations of plaintiff's complaint on the ground that there are no genuine fact issues and plaintiff has failed to state an LMRDA claim as a matter of law. These allegations are: that plaintiff was denied coffee breaks; that he was denied the right to converse with co-workers; and that he was forced to defend a $300,000 law suit brought by defendant Ayik. Plaintiff's own deposition testimony establishes that he was never denied coffee breaks guaranteed under the collective bargaining agreement, but only the alleged right to drink coffee while working. As to the denial of his right to speak to co-workers, plaintiff testified that he thought he had an unrestricted right to talk to other employees who were working. Plaintiff also testified that both the coffee break problem and the conversation problem have since been resolved. In addition, the lawsuit filed by Ayik has now been withdrawn. Even assuming that these

three remaining allegations state a live case or controversy, I rule that they fail to state a claim under the free speech provision of the LMRDA and, therefore, that the union defendants are entitled to summary judgment on these allegations as well.

Plaintiff has also made passing reference in his complaint to the "disciplinary rights" section of the LMRDA, 29 U.S.C. § 411(a)(5). However, since the three remaining allegations do not state that plaintiff has been "fined, suspended, expelled, or otherwise disciplined," he fails to state a claim under that section as well.

Plaintiff's claim against GMC and the union defendants under the First Amendment is frivolous and deserves no separate consideration. See *Hudgens* v. *NLRB*, 424 U.S. 507 (1976).

Order accordingly.

Andrew A. Caffrey, Ch. J.

Appendix C.

29 U.S.C. § 185
[in pertinent part]

§ 185. [Suits by and against labor organizations]

[Venue, amount, and citizenship]

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments]

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Appendix D.

29 U.S.C. § 412

§ 412. [Civil action for infringement of rights; jurisdiction]

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Pub.L. 86-257, Title I, § 102, Sept. 14, 1959, 73 Stat. 523.

Appendix E.

General Provisions of Collective Bargaining Agreement
[in pertinent part]

(215) Supervisory employes shall not be permitted to perform work on any hourly-rated job except in the following types of situations: (1) in emergencies arising out of unforeseen circumstances which call for immediate action to avoid interruption of operations; (2) in the instruction or training of employes, including demonstrating the proper method to accomplish the task assigned.

No. 80-1603

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ARMAND BERARD,

Petitioner,

v.

GENERAL MOTORS CORPORATION; UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; UNITED AUTOMOBILE WORKERS LOCAL 422 AND BAHEEGE AYIK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION FOR UAW

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Did the Court of Appeals err in affirming the district court's dismissal of the case, based upon union and employer motions for summary judgment and motions to dismiss where:

(a) It was undisputed that plaintiff suffered no injury as a result of certain of the employer's alleged breaches of the collective bargaining agreement?

(b) It was undisputed that the unions adequately handled plaintiff's personal grievances?

(c) It was undisputed that the actions upon which Berard's LMRDA free speech claim took place were outside the period covered by the Massachusetts tort statute of limitations?

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OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is unreported. Pet. App. 1a-3a. The opinion of the District Court is reported at 493 F.Supp. 1035 (D. Mass. 1980). Pet. App. 4a-19a.

COUNTERSTATEMENT OF THE CASE

A. Facts

The petitioner, Armand Berard, began to work for General Motors Corporation (GM) on April 5, 1948, at the Framingham, Massachusetts Chevrolet plant. Berard joined the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the International), and its Local 422, UAW (Local 422), approximately a year later.[1]

Over the next 25 years, Berard held a number of union posts, both elected and appointed. In 1974, Berard was the Recording Secretary for Local 422. While Berard was still a member of the Local 422 Executive Board, Local 422 commenced a six-week strike over local issues. The strike ended November 16, 1974.

After the strike ended, Berard began a grievance filing campaign, protesting alleged management performance of bargaining unit work.[2] A-11. For the next year, Berard continued to file an extremely large number of grievances. The grievances related almost exclusively to alleged management performance of bargaining unit work. A-11-12. The grievances he filed were always on behalf of other union members, even though he no longer held an elected office. Although Berard did not like the results of his campaign, he admitted Local 422 properly processed the grievances. A-12.

Berard has never been a model worker. Between June, 1974, and August, 1979, Berard was given 13 disci-

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[1] The respondents in this case are GM, the International, Local 422, and Baheege Ayik, who is chairman of the Local 422 bargaining committee.

[2] Such behavior by management would violate ¶ 215 of the Master Agreement between GM and the International. *See*, Pet. App.-22, hereafter A-22.

plinary layoffs for violations of shop rules. A-12. Local 422 filed a grievance on each discipline, and 12 were settled entirely favorably, and 1 was compromised. A-12.

During this period, Berard filed unfair labor practice charges against GM and Local 422 with the National Labor Relations Board. The factual allegations in the charge were substantially the same as those contained in the Complaint in this case, including the conspiracy and discrimination allegations. In 1978, after an investigation, the Regional Director of the NLRB refused to issue a complaint. He found the company's actions to have been legitimate and that Local 422 had not breached its duty of fair representation or otherwise restrained or coerced Berard in the exercise of his rights. A-9.

B. Procedural History

Berard filed the Complaint on August 7, 1979. The Complaint was served on Local 422 and on Baheege Ayik, but was never served on the International. GM filed its Answer on September 21, 1979, while Local 422 filed its Answer on October 1, 1979, and Baheege Ayik filed his Answer on October 30, 1980. The International filed its Answer on February 14, 1980, and included among its defenses a lack of service of process.

All of the union defendants moved for partial summary judgment, as to most of the allegations contained in the Complaint, on May 20, 1980. The union defendants asserted the allegations contained certain paragraphs were beyond the applicable statute of limitations. The motion of the union defendants was accompanied by a memorandum and an affidavit by the International Servicing Representative, Frank Ceccaroni.

On June 6, 1980, GM moved to amend its answer and for summary judgment. That same day, the district

court called the case for trial, to begin June 10, 1980, and ordered Berard's attorney to respond to the motions for summary judgment and the outstanding interrogatories by June 9, 1980. On June 9, 1980, Berard opposed the union's motion for partial summary judgment with only a memorandum, urging the limitations period should be longer than the union asserted. On June 10, 1980, the district court dismissed the International for lack of service of process after Berard's attorney admitted the International had never been formally served with a complaint and summons. After oral argument, Chief Judge Caffrey took all outstanding summary judgment motions under advisement.

On June 20, 1980, Local 422 and Baheege Ayik filed an amended motion for summary judgment, alleging those portions of the Complaint which were not time barred failed to state a claim for various reasons, including lack of injury. A supporting memorandum and affidavit by Baheege Ayik accompanied the amended motion. Berard never opposed the union defendants' amended motion for summary judgment.

On July 24, 1980, Judge Caffrey granted all motions for summary judgment and dismissed the entire case by Memorandum Opinion and Order entered on that date. A-3.

Berard appealed the judgment on August 1, 1980. The Court of Appeals affirmed Judge Caffrey's decision on December 22, 1980, with a *per curiam* opinion, saying only that the "appeal is patently frivolous." A-1.

SUMMARY OF ARGUMENT

The central thrust of petitioner's dispute with respondents concerns alleged violations of ¶ 215 of the Master Agreement between GM and the International which prohibits management from performing bargaining unit

work. While Berard filed many grievances on the subject, those grievances did not involve direct harm to him. Instead, they were attempts to police the agreement on behalf of others. Berard lacks standing to bring a breach of contract action under § 301, LMRA, 29 U.S.C. § 185 against GM, and to bring a duty of fair representation action under § 9(a), LMRA, 29 U.S.C. § 160(a) against the union, because he was not threatened with actual harm. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth* v. *Seldin*, 422 U.S. 490 (1975).

The district court properly granted summary judgment on the breach of contract on duty of fair representation issues which did involve Berard. Berard must show a breach of the union's duty of fair representation before he may bring a contract enforcement action against an employer. *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

As required by Rule 56, *Fed. R. Civ. P.*, GM and the union defendants supported their motions with affidavits and citations to Berard's admissions during deposition, and other record evidence to establish an absence of dispute as to material facts. The undisputed facts clearly showed the union had not acted in an arbitrary, capricious, or discriminatory manner and, thus, would not support a claim for breach of the union's duty. Defendants having proven the plaintiffs theories untenable, Berard was obligated under Rule 56(e) to adduce factual issues warranting trial. *First National Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968). Since Berard's Opposition to Summary Judgment was a restatement of the allegations in his Complaint, summary judgment was properly granted.

The undisputed facts also showed that the events on which Berard's free speech claims were based occurred

more than three year's prior to the filing of the Complaint. Following, *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), the district court correctly applied the Massachusetts three-year tort statute of limitations as the most analogous state statute of limitations.

ARGUMENT

I

Berard Has No Standing To Pursue Alleged Breaches Of Contract Which Do Not Threaten His Personal Interests.

The district court in this case addressed many issues when it dismissed this case on motions for summary judgment and motions to dismiss. Most of those issues are listed in a cursory manner in petitioner's description of questions presented. However, the issues may be reduced to a single proposition after analyzing petitioner's reasons for granting writ. Pet. 11-19. Berard asserts he has the right to enforce the collective bargaining agreement "for the benefit of all the union members", even though he admittedly suffered no personal harm, A-13, and did not allege that he was personally threatened with any harm. Clearly, Berard lacks standing to bring such an action, because he has not

> shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation. [*Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976) (footnote omitted).]

Berard attempts to overcome this problem by arguing he is concerned with "concerted activity" within the meaning of § 7, LMRA, 29 U.S.C. § 157. The existence of concerted activity, by itself, does not give rise to a

power to sue an employer for breach of contract under § 301(a), LMRA, 29 U.S.C. 185(a).[3] Further, Berard's reliance on the existence of concerted activity demonstrates he was interested only in protecting group concerns, not personal disadvantage.[4]

Of course, if a breach of a provision of the collective bargaining agreement threatens Berard with direct harm, he has standing to sue for breach of that contract under § 301, LMRA, *Smith* v. *Evening News*, 371 U.S. 195 (1962), assuming he either exhausted the contractual grievance procedure, *Republic Steel* v. *Maddox*, 379 U.S. 650 (1965), or shows that the grievance procedure was not exhausted because of a union breach of the duty of fair representation. *Hines* v. *Anchor Motor Freight*, 424 U.S. 554 (1976).

The Court of Appeals for the Eighth Circuit successfully drew the distinction between the standing of an individual to bring an action under § 301, LMRA, enforcing "uniquely personal" rights instead of those rights possessed by the bargaining unit as a whole. *Brown* v. *Sterling Aluminum Products Corporation*, 365 F.2d 651, 657 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967).[5] As that panel so aptly wrote:

> The individual would have no standing to compel discussion of broad collective bargaining principles

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[3] Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. [§ 301(a), LMRA.]

[4] That reliance is fatal in the face of an admission of no personal harm.

[5] Then, Judge Blackmun was part of the unanimous panel in that case.

> . . . even if such discussion were required by the existing collective bargaining agreement. [365 F.2d at 657.]

The other courts of appeals have not dissented from this view. The Second Circuit held the individual has no power under either § 9(a), LMRA, or § 301, LMRA, to compel arbitration since that is a union function. *Black-Clawson Co., Inc.* v. *International Association of Machinists*, 313 F.2d 179 (2nd Cir. 1962). But, an individual may bring an action under § 301, LMRA, to enforce an arbitration award to which a union was a party. *Santos* v. *District Council of New York City*, 547 F.2d 197 (2nd Cir. 1977).

The Seventh Circuit first noted in *dicta* that an individual may sue for a breach of a promise contained in a collective bargaining agreement that was intended to confer a benefit upon that individual, *Adamszewski* v. *Local Lodge 1487, International Association of Machinists and Aerospace Workers*, 496 F.2d 777, 786 (7th Cir.), *cert. denied*, 419 U.S. 997 (1974), and later held that the uniquely personal rights' test for standing in a § 301, LMRA suit was met where employees sought the direct benefit of training, allegedly required by contract. *Schultz* v. *Owens-Illinois, Inc.*, 560 F.2d 849, 855 (7th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

Similarly, the Ninth Circuit held that "personal rights" may be enforced by individuals under § 301. *Lerwill* v. *Inflight Motion Pictures, Inc.*, 582 F.2d 507, 511 (9th Cir. 1978).[6]

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[6] The Sixth Circuit has also noted in *dicta* that the question of

> [w]hether standing exists in a particular case turns upon the nature of the right or duty which the individual seeks to enforce.

[*Bryant* v. *International Union, United Mine Workers of America*, 467 F.2d 1, 3 n.1 (6th Cir. 1972) *cert. denied*, 410 U.S. 930 (1973).]

These decisions, as well as the decision below, are consistent with the need for each plaintiff to demonstrate a "personal stake in the outcome of the controversy", before the federal courts will accept jurisdiction. *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). Since there is also no conflict among the circuits, this Court should reject the petition.[7]

II

Summary Judgment Was Appropriately Granted Where There Was No Factual Dispute That Local 422 Obtained Favorable Results On Plaintiff's Disciplinary Grievances.

In addition to the ¶ 215 violations, alleged to be a breach of contract, Berard challenged certain disciplines as being part of a conspiracy between Local 422 and GM. Berard asserts the alleged wrongful behavior violated the union's duty of fair presentation, and the incidents were a breach of contract by GM. Berard clearly had standing to challenge those disciplines under § 301, LMRA, so long as he proved the union breached its duty of fair representation owed him under § 9(a), LMRA. *Hines* v. *Anchor Motor Freight*, 424 U.S. 554 (1976).

The courts below properly applied *Vaca* v. *Sipes*, 386 U.S. 171 (1967) in holding the union did not breach its duty of fair representation as to Berard's disciplinary grievances. The district court found there was no factual dispute as to the handling of those grievances. The union obtained full back pay for all but one of Berard's many disciplines. A-13. GM, Local 422, and Ayik dem-

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[7] Berard wrongly implies *Kaferle* v. *Frederick*, 360 F.2d 536 (3rd Cir. 1966) demonstrates as split among the circuits on the issue of standing. The court in that case held individuals may pursue personal "complaints of wage deficiencies" under § 301, unless they have failed to exhaust the contractual grievance procedure. *Id.*, at 539. Obviously, the dispute there was not simply a discussion of collective bargaining principles. Rather, it involved issues in which the plaintiff had a "personal stake."

onstrated through affidavits, memoranda, Berard's own deposition testimony, and exhibits the absence of factual dispute. As required by Rule 56, respondents *proved* there was no breach of the duty of fair representation on the undisputed facts. The demonstrated facts could not support plaintiff's theory of arbitrary, discriminatory, or capricious grievance handling in breach of the duty of fair representation, as outlined by *Vaca* v. *Sipes*, 386 U.S. at 190.[8]

The respondents clearly met their obligation of providing evidentiary matter which established the absence of a genuine issue "even if no evidentiary matter [was] presented" in opposition. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 160 (1970). Therefore, under Rule 56(e), Berard could not rely on his allegations in the Complaint, but was obligated to come forward with affidavits or other record evidence establishing a dispute as to material fact. *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 288-290 (1968). Since Berard utterly failed to do anything but repeat the allegations in his Complaint, summary judgment was properly granted.

The decision below is consistent with *First National Bank* v. *Cities Service Co.* and *Adickes* v. *Kress & Co.* There is no reason to grant the petition.

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[8] Berard's distress at the district court's recognition of the NLRB's refusal to issue a complaint is misplaced. Pet. 15-17. First, the district court did *not* hold the refusal was *res judicata* on the issue of the duty of fair representation. A-10. Second, although the district court gave the decision "considerable weight" in establishing an absence of factual dispute, A-10, the court also specifically noted the record supported a finding that the union properly processed all of Berard's grievances. A-13. Thus, the NLRB refusal to issue was merely a significant piece of evidence in the record, indicating the union's treatment of Berard's grievances was not arbitrary, capricious, or discriminatory in nature. *E.g.*, *Vaca* v. *Sipes*.

III

The Massachusetts Tort Statute Of Limitation Is The Most Appropriate For LMRDA Free Speech Actions.

Berard raises as a question, although he made no argument on the issue, whether the court below correctly determined the statute of limitations for violations of the free speech provisions of the § 101, LMRDA, 29 U.S.C. § 411.

There is no express federal statute of limitations for actions brought pursuant to § 101, LMRDA. In the absence of an express federal statute of limitations, *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) instructs the federal courts to use the most analogous state statute of limitations.

The district court in this case applied the Massachusetts general tort statute of limitations.[9] A-16. The affirmance by the Court of Appeals is consistent with other decisions holding LMRDA free speech actions are more analogous to tort claims than contract claims.[10] *Howard* v. *Aluminum Workers International Union*, 589 F.2d 771, 774 (4th Cir. 1978); *Sewell* v. *Grand Lodge of the International Association of Machinists and Aerospace Workers*, 445 F.2d 545, 550 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972).[11]

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[9] Mass. Gen. Laws, ch. 260 § 2A is a three-year statute of limitations.

[10] The First Circuit has held that statutory civil rights actions generally are closer to common law tort than contract actions. *Graffals* v. *Garcia*, 550 F.2d 687 (1st Cir. 1977).

[11] At least one circuit has held such an action is clearly *not* one in contract, though there may be a state period of limitations more appropriate than that for torts. *E.g., Copitas* v. *Retail Clerks International Association*, 618 F.2d 1370 (9th Cir. 1980).

Again, the decision below is consistent with *UAW* v. *Hoosier*, and the decisions of the other courts of appeals.

CONCLUSION

There are no reasons of law or policy warranting review of this case by the Court. The Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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